FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: OFFICE OF THE COMMISSION SECRETARY

DATE: October 12, 2006

SUBJECT: COMMENTS ON DRAFT AO 2006-31

Transmitted herewith are timely submitted comments from Messrs. Gregg P. Skall and Michael H. Shacter, Attorneys to the Named State Associations, regarding the above-captioned matter.

The proposed draft advisory opinion is being considered under an expedited process.

Attachment

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October 13, 2006

BY ELECTRONIC MAIL

Lawrence M. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Comments on AOR 2006-31

Dear Mr. Norton:

This firm serves as counsel to Arizona Broadcasters Association, California Broadcasters Association, Illinois Broadcasters Association, Louisiana Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Missouri Broadcasters Association, New Jersey Broadcasters Association, Oregon Association of Broadcasters, Washington State Association of Broadcasters (collectively, the "Named State Associations"). Each of the Named State Associations is, in turn, a voluntary association of broadcasters who are Federal Communications Commission ("FCC") licensees of radio and television stations. The Named State Associations submit these comments to Advisory Opinion Request 2006-31 (the "Casey AOR"), submitted by the Bob Casey for Pennsylvania Committee (the "Casey Committee").

The Casey AOR asks the question whether "[h]aving forfeited eligibility to the lowest unit rate, may the Committee receive the lowest unit charge for television airtime..., even if it is no longer statutorily entitled to that rate...?" The General Counsel has circulated two alternative drafts of AO 2006-31. The Named State Associations urge the Commission to adopt AO Draft A, and to conclude that as long as a broadcast station offers the applicable lowest unit charge ("LUC") to all Federal candidates, the LUC is a discount offered in the ordinary course of business and therefore would not be an in-kind contribution when offered to a candidate who has lost the entitlement to the LUC.

Almost two years ago, on October 29, 2004, the Missouri Broadcasters Association submitted AOR 2004-43. One of the two questions presented was:

> Whether offering the lowest unit charge by a radio or television station to a candidate for office who is not *entitled* to receive the lowest unit charge—due to the candidate's failure to include the required BCRA Statement in a broadcast commercial—would constitute an in-kind contribution with respect to the difference in cost between lowest unit charge and a higher charge that the station might be permitted to charge to air the candidate's advertisement?

This is a vital issue for broadcasters, who find themselves as the political football in an often vicious game played by political candidates. The Commission should take this opportunity to adopt AO Draft A and to answer this question definitively. Because the LUC is based on the rates available to certain commercial advertisers, it is by definition offered to other customers in the ordinary course of business. Accordingly, offering the lowest unit charge for a broadcast commercial to all candidates for a Federal elective office (regardless of entitlement) does not constitute an in-kind contribution by a radio or television station.

Statutory Background

Pursuant to §315(b) of the Communications Act of 1934, broadcasters are required to charge certain political candidates the station's "lowest unit charge" for the candidate's commercial advertisements in the 45 days preceding certain primary elections and the last 60 days before a general election. The Bipartisan Campaign Reform Act of 2002, P.L. 107-155, 116 Stat. 81 (March 27, 2002) ("BCRA") supplemented the lowest unit charge provisions to remove the entitlement to lowest unit charge in certain circumstances. A candidate "shall not be entitled" to this rate for commercials that make a direct reference to an opponent unless the commercial includes a statement that identifies the candidate and states that the candidate has approved the communication (the "BCRA Statement").

For radio broadcasts, the BCRA Statement must consist of a personal audio statement by the candidate identifying himself or herself, the office sought, and an approval of the message. In the case of television commercials, for a period of no less than 4 seconds at the end of a commercial there must appear simultaneously (i) a clearly identifiable photographic or similar image of the candidate; and (ii) a clearly readable printed statement, identifying the candidate and stating that the candidate has approved the broadcast and that the candidate's authorized committee paid for the broadcast.

If a commercial fails to meet these requirements, Section 315(b) of the Communications Act, as amended by BCRA, provides that the candidate "shall not be entitled" to receive the lowest unit rate for that commercial or any other commercial broadcast in the remaining days before the applicable primary or general election. Candidates must also provide written certification to each broadcast station that they will comply with these provisions.

Discussion

In their comments Campaign Legal Center and Democracy 21 (the "Public Interest Commenters") appear to read a non-existent requirement into the lowest unit charge provisions of BCRA that would forbid broadcasters from voluntarily charging the LUC to any candidate who has lost his or her *entitlement* to the LUC.

To support their position, the Public Interest Commenters emphasize that the same loss of entitlement language appears twice in the statute. But there is no rule of statutory construction that requires words to lose their plain meaning if repeated more than once. To the contrary, the two-fold emphasis actually reinforces the conclusion that a candidate who omits the BCRA statement sacrifices the entitlement, i.e., the right to insist on a discount. Their quotes from the floor debate are no more persuasive. The floor debate is entirely consistent with the plain meaning of the statute. Moreover, what is notable about both the floor debate and the statutory language is the focus on the candidate—not on the broadcaster. Nowhere in the statute does Congress forbid broadcasters from offering the LUC upon the loss of a candidate's entitlement. The possible consequence is aimed solely at the offending candidate.

Section 315(b) of the Communications Act grants an entitlement to candidates. Broadcast stations are required to give candidates the lowest unit charge for campaign commercials, subject to certain requirements, such as the BCRA Statement. A candidate who fails to satisfy these requirements loses the *entitlement* to receive the lowest unit charge. It is logically incorrect, however, to infer from this loss of entitlement that a broadcaster is prohibited from charging the candidate the lowest unit charge.

The phrase "shall not be entitled to" is used in Section 315(b), as distinguished from prohibitions that are used elsewhere in the law. The Oxford English Dictionary defines "entitle" as to "give just claim or right". Webster's English Dictionary defines "entitle" as giving an "enforceable right". The loss of a right does not impose a complimentary duty on others to deny a privilege; in this case it does not impose the obligation on broadcasters to increase their charges to a candidate.

Nowhere does the statute impose a minimum amount that a broadcast station must charge a candidate. On the contrary, §315(b)(1) focuses solely on preventing stations from over-charging candidates. It specifically states that charges "shall not exceed" the lowest unit charge during periods before certain primary and general elections. The Public Interest Commenters have misinterpreted and erroneously defined the explicit language of the statute to read in an obligation on the part of broadcasters to charge a minimum amount in those situations where lowest unit charge does not apply.

Significantly, Section 315(b)(2), which governs the rates a broadcast station may charge candidates, is entitled "Limitation on Charges" *not* "Imposition of Minimum Charge". The section states that a candidate who fails to include the BCRA Statement "shall not be entitled to receive the" lowest unit charge. This simply means that a candidate can no

longer insist on receiving a radio or television station's lowest unit charge. It does not mean the candidate is prohibited from receiving that rate or that there is a positive duty on a broadcaster to charge more. Broadcast stations may now decide whether to charge the candidate the lowest unit charge or some other rate in keeping with §315(b)(1)(B).

The FCC is the governmental agency charged with responsibility for applying the Communications Act, including the lowest unit charge provisions of §315(b). The FCC's implementation of the statute is set forth in 47 U.S.C. §73.1942. As is true of the statute, the rule focuses solely on maximums. Mirroring the language of §315(b)(1), §73.1942(a) states that charges "shall not exceed" specified amounts. Where the lowest unit charge is not in effect, §73.1942(a)(2) states that charges may be "*no more than* the charges made for comparable use of the station by commercial advertisers". Nowhere in the FCC's interpretation of the statute is there any reference to a minimum amount that must be charged to candidates for public office. Informal conversations between undersigned counsel and FCC staff members confirms that the FCC staff interprets the BCRA amendments to the Communications Act to allow a broadcaster to offer the LUC to a candidate whose advertisements do not contain the proper BCRA Statement, as long as the station treats all Federal candidates in a consistent, non-discriminatory manner.

Another factor that operates against the interpretation of the Public Interest Commenters is the statutorily imposed principle of equality of opportunity. Section 315(a) of the Communications Act provides in pertinent part that "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station".

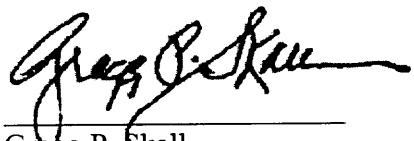
Unlike other corporate contributors, FCC licensees have an independent statutory obligation to treat all candidates alike with respect to what otherwise might be deemed in-kind contributions. Congress recognized that furnishing discounts for campaign advertisements would be consistent with a broadcast station's obligation to operate in the public interest and, therefore, would not constitute in-kind contributions. Consequently, the only restriction on broadcaster discounts in the Communications Act is that they must be furnished to all candidates for the same office.

It must be emphasized that in modern broadcasting, there is no such thing as a "usual and normal charge". Section 315(b) and 47 U.S.C. §73.1942 recognize that broadcast stations charge varying rates to commercial broadcasters, depending on many circumstances—circumstances that are changing all the time. By definition, the lowest unit charge is the lowest of those commercial rates that are charged to commercial advertisers under a similar set of conditions that define a "class" of time, without regard to frequency during the period when the commercial ran on the station. Because broadcaster classes of time and other circumstances change frequently, the FCC staff has informally defined that period to be roughly, the week surrounding the date and time of each advertisement. Although the LUC may be characterized as a discount, it is more correctly identified as one of many fluid rates that are offered to customers in the ordinary course of business.

The FCC has extensively studied the nature of the LUC and the factors that apply to its determination. The fact that the LUC is, by definition, a rate that is offered to customers in the ordinary course of business is one of the reasons FCC staff interpret the BCRA amendments to the Communications Act to allow a broadcasters to offer the LUC to a candidate whose advertisements do not contain the proper BCRA Statement, as long as the station treats all Federal candidates in a consistent, non-discriminatory manner. Accordingly, there is no merit to the approach suggested by AO Draft B, which leaves this conclusion as an open issue.

The Named State Associations encourage the Commission to take this opportunity to adopt the sensible, plain meaning of the BCRA amendments to the Communications Act as set forth in AO Draft A. Offering the lowest unit charge for a broadcast commercial to a candidate for Federal elective office who is not entitled to receive the lowest unit charge, because he or she failed to include a BCRA Statement, does not constitute an in-kind contribution by a radio or television station, provided that it is offered to all Federal candidates.

Respectfully submitted,



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